

Sallisaw, OK, Sallisaw Muni, NDB-A, Amdt 1

Sand Springs, OK, Sand Springs/William R. Pogue Muni, VOR or GPS-A, Amdt 1A, Cancelled

Sand Springs, OK, Sand Springs/William R. Pogue Muni, VOR-A, Amdt 1A

Tulsa, OK, Tulsa/Richard Lloyd Jones Jr., VOR/DME or GPS-A, Amdt 6, Cancelled

Tulsa, OK, Tulsa/Richard Lloyd Jones Jr., VOR/DME-A, Amdt 6

Watonga, OK, Watonga, VOR/DME or GPS-A, Amdt 2, Cancelled

Watonga, OK, Watonga, VOR/DME-A, Amdt 2

Woodward, OK, Woodward/West Woodward, VOR/DME or GPS-A, Amdt 6, Cancelled

Woodward, OK, Woodward/West Woodward, VOR/DME-A, Amdt 6

Abilene, TX, Abilene Regional, VOR or GPS-A, Amdt 8, Cancelled

Abilene, TX, Abilene Regional, VOR-A, Amdt 8A

Amarillo, TX, Amarillo/Tradewind, NDB or GPS-A, Amdt 14, Cancelled

Amarillo, TX, Amarillo/Tradewind, NDB-A, Amdt 14

Bay City, TX, Bay City Muni, VOR/DME or GPS-A, Amdt 4A, Cancelled

Bay City, TX, Bay City Muni, VOR/DME-A, Amdt 4A

Beaumont, TX, Beaumont Muni, VOR/DME or GPS RWY 13, Amdt 2, Cancelled

Beaumont, TX, Beaumont Muni, VOR/DME RWY 13, Amdt 2

Breckenridge, TX, Breckenridge/Stephens County, NDB or GPS-A, Amdt 1A, Cancelled

Breckenridge, TX, Breckenridge/Stephens County, NDB-A, Amdt 1A

Cleveland, TX, Cleveland Muni, VOR or GPS-A, Amdt 4, Cancelled

Cleveland, TX, Cleveland Muni, VOR-A, Amdt 4

Del Rio, TX, Del Rio Intl, VOR/DME or GPS-B, Amdt 4, Cancelled

Del Rio, TX, Del Rio Intl, VOR/DME-B, Amdt 4

Del Rio, TX, Del Rio Intl, VOR or GPS-A, Amdt 11, Cancelled

Del Rio, TX, Del Rio Intl, VOR-A, Amdt 11

Dumas, TX, Dumas/Moore County, VOR/DME or GPS-A, Amdt 6, Cancelled

Dumas, TX, Dumas/Moore County, VOR/DME-A, Amdt 6

Fort Stockton, TX, Fort Stockton-Pecos County, VOR/DME or GPS-A, Amdt 5A, Cancelled

Fort Stockton, TX, Fort Stockton-Pecos County, VOR/DME-A, Amdt 5A

George West, TX, George West/Live Oak County, VOR/DME or GPS-A, Amdt 1, Cancelled

George West, TX, George West/Live Oak County, VOR/DME-A, Amdt 1

Giddings, TX, Giddings-Lee County, VOR/DME or GPS-A, Amdt 3, Cancelled

Giddings, TX, Giddings-Lee County, VOR/DME-A, Amdt 3

Henderson, TX, Henderson/Rusk County, VOR/DME or GPS-A, Amdt 3A, Cancelled

Henderson, TX, Henderson/Rusk County, VOR/DME-A, Amdt 3A

Liberty, TX, Liberty Muni, VOR or GPS-A, Amdt 5, Cancelled

Liberty, TX, Liberty Muni, VOR-A, Amdt 5

Llano, TX, Llano Muni, VOR or GPS-A, Amdt 3, Cancelled

Llano, TX, Llano Muni, VOR-A, Amdt 3

Lubbock, TX, Lubbock Intl, VOR or GPS-A, Amdt 6, Cancelled

Lubbock, TX, Lubbock Intl, VOR-A, Amdt 6

McKinney, TX, McKinney Muni, VOR/DME or GPS-A, Orig-B, Cancelled

McKinney, TX, McKinney Muni, VOR/DME-A, Orig-B

Mexia, TX, Mexia-Limestone County, NDB or GPS-A, Amdt 3, Cancelled

Mexia, TX, Mexia-Limestone County, NDB-A, Amdt 3

Pampa, TX, Pampa/Perry Lefors Field, VOR/DME or GPS-A, Amdt 2, Cancelled

Pampa, TX, Pampa/Perry Lefors Field, VOR/DME-A, Amdt 2

Pleasanton, TX, Pleasanton Muni, NDB or GPS-A, Amdt 5A, Cancelled

Pleasanton, TX, Pleasanton Muni, NDB-A, Amdt 5A

Port Isabel, TX, Port Isabel-Cameron County, VOR/DME or GPS-B, Amdt 2A, Cancelled

Port Isabel, TX, Port Isabel-Cameron County, VOR/DME-B, Amdt 2A

Port Isabel, TX, Port Isabel-Cameron County, VOR or GPS-A, Amdt 5A, Cancelled

Port Isabel, TX, Port Isabel-Cameron County, VOR-A, Amdt 5A

San Antonio, TX, San Antonio Intl, VOR or GPS-A, Amdt 5, Cancelled

San Antonio, TX, San Antonio Intl, VOR-A, Amdt 5

Sulphur Springs, TX, Sulphur Springs Muni, VOR/DME or GPS-B, Amdt 6, Cancelled

Sulphur Springs, TX, Sulphur Springs Muni, VOR/DME-B, Amdt 6

Sulphur Springs, TX, Sulphur Springs Muni, VOR or GPS-A, Amdt 4, Cancelled

Sulphur Springs, TX, Sulphur Springs Muni, VOR-A, Amdt 4

[FR Doc. 00-30525 Filed 11-29-00; 8:45 am]

**BILLING CODE 4910-13-M**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Parts 121, 125, 135 and 145

[Docket No. 28293 (FAA-2000-7952)]

RIN 2120-AF71

#### Service Difficulty Reports

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule, notice of meeting.

**SUMMARY:** The Federal Aviation Administration (FAA) is issuing this notice to advise the public of a meeting to discuss public concerns with reporting requirements of the Service Difficulty Report (SDR) Final Rule, Docket No. 28293 (FAA-2000-7952)

**DATES:** The meeting will be held on December 11, 2000, 9 a.m. to 12 p.m. Arrangements for presentations must be made by December 6, 2000.

**ADDRESSES:** The meeting will be held at the FAA 3rd Floor Auditorium, 800

Independence Ave., SW, Washington, DC 20591.

**FOR FURTHER INFORMATION CONTACT:** Jose Figueroa, Federal Aviation Administration, AFS-300, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267-3797, fax (202) 267-5115.

**SUPPLEMENTARY INFORMATION:** The meeting will be held on December 11, 2000, from 9 a.m. to 12 p.m., at the FAA 3rd Floor Auditorium, Washington, DC. The agenda will include:

1. SDR Reporting Requirements
2. SDR Guidance Materials

Attendance is open to the interested public, but will be limited to the space available. The public must make arrangements by December 6, 2000, to present oral statements at the meeting. If you are in need of assistance or require a reasonable accommodation for the meeting please contact the person listed under the heading **FOR FURTHER INFORMATION CONTACT**. In addition, sign and oral interpretation can be made available at the meeting, as well as an assistive listening device, if requested 10 calendar days before the meeting. Arrangements may be made by contacting the person listed under the heading **FOR FURTHER INFORMATION CONTACT**.

Issued in Washington, DC, on November 16, 2000.

**L. Nicholas Lacey,**

*Director, Flight Standards Service.*

[FR Doc. 00-29792 Filed 11-29-00; 8:45 am]

**BILLING CODE 4910-13-M**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### 18 CFR Part 385

[Docket No. RM98-1-001; Order No. 607-A]

#### Regulations Governing Off-the-Record Communications

Issued: November 21, 2000.

**AGENCY:** Federal Energy Regulatory Commission.

**ACTION:** Order on rehearing and clarification.

**SUMMARY:** On September 15, 1999, the Federal Energy Regulatory Commission (Commission) issued a final rule (Order No. 607), revising its regulations governing off-the-record communications between persons outside the Commission and the Commission and its employees. The general framework established by the

rule remains the same. The order does, however, grant rehearing and clarification in instances where the suggested changes will improve the new procedures.

**EFFECTIVE DATE:** The regulations are effective January 2, 2001.

**FOR FURTHER INFORMATION CONTACT:** Samuel Soopper, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426 (202) 208-0154.

**SUPPLEMENTARY INFORMATION:** This order addresses the requests for rehearing and clarification of the Commission's final rule (Order No. 607) revising its regulations governing off-the-record communications between persons outside the Commission and the Commission and its employees.<sup>1</sup> The general framework established by the rule remains the same. This order does, however, grant rehearing and clarification in instances where the suggested changes will improve the new procedures and contribute to ensuring that the final rule fulfills its intention to permit fully informed decisionmaking while ensuring the integrity of the Commission's decisionmaking process.

## I. Background

In promulgating Order No. 607, the Commission recognized that its prior *ex parte* regulations had been difficult to interpret and apply, both by its own staff as well as private parties. As the result of a public conference held in March 1992, a general consensus developed favoring a revised rule that would provide the Commission, the public, the industries it regulates and interested governmental bodies with a clearer statement of what communications are prohibited and when the prohibitions apply. Additionally, the Commission recognized the benefits of enhancing its access to information from Federal and state agencies and other interested persons to the extent consistent with law and fair process.

On September 16, 1998, the Commission issued a Notice of Proposed Rulemaking (NPR) to revise its procedural rules concerning communications between the Commission and its employees and persons outside the Commission.<sup>2</sup> The NPR requested comments on the proposed changes to the Commission's

procedural rules governing such communications.<sup>3</sup> Thirty-two commenters, representing the hydropower, electric power, and natural gas pipeline industries, as well as state and Federal resource agencies, filed comments generally supporting adoption of the rule as proposed in the NPR.

The final rule promulgated by the Commission was based on the fundamental APA principles that are the foundation for the *ex parte* prohibition, and furthers the basic tenets of fairness: (1) a hearing is not fair when one party has private access to the decision maker and can present evidence or argument that other parties have no opportunity to rebut;<sup>4</sup> and (2) reliance on "secret" evidence may foreclose meaningful judicial review.<sup>5</sup> The final rule sets out when communications between the Commission and Commission staff and persons outside the Commission may take place off the record, and when such communications must take place on the record. The final rule also provided specific directions on how both prohibited and exempted off-the-record communications will be handled by the Secretary's office and how public notice of such communications will be made.

The final rule prohibits off-the-record communications made in a "contested on-the-record proceeding," defined as "any proceeding before the Commission to which there is a right to intervene and in which an intervenor disputes any material issue, or any proceeding initiated by the Commission on its own motion or in response to a filing." Proceedings not covered by this rule include informal (*i.e.*, notice and comment) rulemaking proceedings under 5 U.S.C. 553; investigations under part 1b of the Commission's regulations; any other proceeding not having a "party or parties," as defined in Rule 102 of the Commission Rules of Practice and Procedure;<sup>6</sup> and any proceeding in which no party disputes any material issues.

The final rule articulated seven exemptions to the general prohibition against off-the-record communications relevant to the merits of proceedings at the Commission: (1) communications expressly permitted by rule or order; (2)

certain communications related to emergencies; (3) communications agreed to by all parties; (4) written communications from non-party elected officials; (5) certain communications with other Federal, state, local and Tribal agencies that are not parties; (6) certain communications related to preparation of National Environmental Policy Act (NEPA) documentation; and (7) communications with individual non-party landowners. Additionally, the final rule established notice and disclosure requirements for both prohibited and exempted communications, as well as sanctions for noncompliance with the rule.

Timely requests for rehearing and/or clarification of Order No. 607 were filed by Chevron Pipe Line Company (Chevron); Edison Electric Institute (EEI); Indicated Shippers;<sup>7</sup> Interstate Natural Gas Association of America (INGAA); Southern Company Services, Inc. (SCSI); and the United States Department of the Interior (Interior). Their requests for rehearing and/or clarification will be addressed below. The topic headings in the discussion section generally track those used in Order No. 607. In addition, the Commission, upon further consideration, has identified several implementation issues that require clarification of the rule, as discussed below.

## II. Discussion

### A. Definitions in the Final Rule

#### (1) Contested On-the-Record Proceeding

In the final rule, the Commission defined a "contested on-the-record proceeding" in Rule 2201(c)(1)(i) as follows:

Except as provided in paragraph (c)(1)(ii) of this section, any proceeding before the Commission to which there is a right to intervene and in which an intervenor disputes any material issue, or any proceeding initiated by the Commission on its own motion or in response to a filing. [8]

However, the general rule prohibiting off-the-record communications goes on to state that it applies to, *inter alia*, "[c]omplaints initiated pursuant to rule

<sup>1</sup> Regulations Governing Off-the-Record Communications, Order No. 607, 64 FR 51222 (Sept. 15, 1999).

<sup>2</sup> Regulations Governing Off-the-Record Communications, 63 FR 51312 (Sept. 25, 1998); FERC Stats. & Regs. [Proposed Regulations 1988-1998] ¶ 32,534 (Sept. 16, 1998).

<sup>3</sup> The Commission sought comments notwithstanding that, because this is a procedural rule, no opportunity for comment is required by the Administrative Procedure Act (APA).

<sup>4</sup> *WKAT, Inc. v. FCC*, 296 F.2d 375 (D.C. Cir.), *cert. denied*, 360 U.S. 841 (1961).

<sup>5</sup> *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *U.S. Lines v. Federal Maritime Commission*, 584 F.2d 519, 541-542 (D.C. Cir. 1978).

<sup>6</sup> 18 CFR 385.102 (2000). This would also include any proceeding that does not have a docket number.

<sup>7</sup> Indicated Shippers consist of Amoco Production Company, Amoco Energy Trading Corporation, Anadarko Petroleum Corporation, Chevron U.S.A. Inc., Exxon Corporation, Marathon Oil Company, and Shell Offshore Inc.

<sup>8</sup> 18 CFR 385.2201(c)(1)(i). Paragraph (c)(1)(ii) excludes from the definition notice-and-comment rulemakings under 5 U.S.C. 553, investigations under 18 CFR Part 1b, proceedings that do not have a party or parties, and any proceeding in which no party disputes any material issue. 18 CFR 385.2201(c)(1)(ii).

206 from the date of the filing of the complaint with the Commission.”<sup>9</sup>

A. On rehearing, Chevron states that there is “clear contradiction” between these provisions, in that Rule 2201(c)(1)(i) as promulgated apparently does not include a complaint proceeding as a “contested on-the-record proceeding” until a response is filed, while Rule 2201(d)(1)(iii) prohibits *ex parte* communications from the date of the filing of the complaint.<sup>10</sup> Chevron requests that the Commission amend the definition of Rule 2201(c)(1)(i) to specifically include a complaint pursuant to Rule 206.

The Commission grants rehearing on this issue. We will resolve this inconsistency by amending Rule 2201(c)(1)(i) to read as follows:

Except as provided in paragraph (c)(1)(ii) of this section, any proceeding before the Commission to which there is a right to intervene and in which an intervenor disputes any material issue, *any proceeding initiated pursuant to rule 206 by the filing of a complaint with the Commission*, or any proceeding initiated by the Commission on its own motion or in response to a filing.

B. Chevron also argues on rehearing that the definition established by Order No. 607 for “off-the-record communication” is too broad because it does not take into account that the Commission’s complaint regulations “allow both a complainant and a respondent to file information with the Commission that is not served on other parties to the proceeding pending execution of a protective agreement.”<sup>11</sup> Chevron proposes that the Commission remedy this situation by adding an additional exemption to Rule 2201(e) for documents and information filed with the Commission with a request for privileged treatment, but not served on a party pending the execution of a protective agreement.

The Commission denies Chevron’s request for rehearing on this issue. Rule 2201(e)(1)(i) specifically provides an exemption from the *ex parte* prohibitions of the rule for “[a]n off-the-record communication permitted by law and authorized by the Commission.”<sup>12</sup> Because requests for privileged treatment in a complaint proceeding are authorized by the Commission’s regulations, it follows that they fall within this exemption and do not violate the *ex parte* rule. We further observe that a party requesting privileged treatment of documents under the Commission’s rules, 18 CFR

388.112, is required to file a public version of any document for which such treatment is sought. Thus, the public will have notice of any such filing, which is consistent with the public notice provisions for exempt off-the-record communications established by Order No. 607, and can request access to the privileged information subject to the terms of an appropriate protective order.<sup>13</sup>

C. Interior argues on rehearing that Rule 2201(c)(1)(i) should require the Commission to provide notice that the *ex parte* rule has been triggered in specific proceedings. According to Interior, relying on the parties to determine whether the rule applies, based on whether an intervention renders a proceeding contested, is arbitrary and unduly burdensome.

The Commission denies rehearing. We do not believe that the rule places an undue burden on a person to ascertain from the face of a motion to intervene filed in a proceeding whether it is a mere formality or raises issues so as to render a proceeding “contested.” Under the Commission’s regulations “[a]ny motion to intervene must state, to the extent known, the position taken by the movant and the basis in fact and law for that position.”<sup>14</sup> Further, any person who is uncertain of the significance of a particular motion to intervene can avoid the application of the *ex parte* rule simply by making his or her communication on the record.

## (2) Relevant to the Merits

The final rule established that “[p]rocedural inquiries, such as a request for information relating solely to the status of a proceeding,” are not considered communications that are “relevant to the merits” of a proceeding for purposes of rule.<sup>15</sup> In discussing this provision in Order No. 607, we observed:

Although simple requests for action by a specific date or for expedited action may be viewed as not relevant to the merits, the Commission strongly encourages that any such requests be made in writing and on the record.<sup>16</sup>

A. On rehearing, Indicated Shippers object that this discussion represents a “prohibition against timing communications \* \* \* [that] will chill if not eliminate altogether legitimate inquiries into the timing of a Commission decision in a contested

matter.”<sup>17</sup> According to Indicated Shippers, this conclusion is contrary to the APA’s exclusion of requests for status reports from its definition of prohibited *ex parte* communications,<sup>18</sup> as well as judicial and Commission precedent.<sup>19</sup> Indicated Shippers also believe that the Commission’s position runs afoul of the stated goal of Order No. 607 to increase flexibility in communications.

The Commission denies rehearing. We reject the contention that this aspect of Order No. 607 or our interpretation of it runs afoul of either the APA or the precedent on which the Indicated Shippers rely. First, nothing in the APA is contrary to our view that a request for expedited action must be made on the record to properly lie before the Commission. The APA does not prohibit an agency from taking such a measure to ensure the orderly processing of its dockets. Neither, for that matter, does *Gulf Oil* or *Iroquois*.<sup>20</sup>

Furthermore, status reports, as referred to by the statute, refer to reports about events that have already occurred, not requests for future action by an agency. Nothing in the APA requires an agency to provide status reports to persons making such requests. In this regard, we observe that the Commission has a specific rule that the nature and timing of its proposed actions are “confidential and shall not be divulged to anyone outside the Commission.”<sup>21</sup>

B. While the NOPR had proposed an exemption for certain staff communications concerning compliance matters where the compliance issue is not a subject of the rehearing, the final rule did not include such an exemption. Rather, Rule 2201(c)(5)(iii) provides that “relevant to the merits” does not include “[c]ommunications relating to

<sup>17</sup> Indicated Shippers Request for Rehearing at 5–6.

<sup>18</sup> *Id.* at 6, citing 5 U.S.C. 551(14).

<sup>19</sup> *Id.*, citing *Gulf Oil Company v. FPC*, 563 F.2d 588, 611 (3rd Cir. 1977) (*Gulf Oil*) and *Iroquois Gas Transmission System, L.P.*, 52 FERC ¶ 61,091 at 61,431 n.17, *on reh’g*, 53 FERC ¶ 61,194 (1990), *on reh’g*, 54 FERC ¶ 61,103 (1991) (*Iroquois*).

<sup>20</sup> In *Gulf Oil*, the court found that, on the facts before it, actions by some Members of Congress to have the Commission accelerate disposition of a case did not relate to the merits of the case and were insufficient under the circumstances presented to render the Commission’s decision invalid. *Gulf Oil*, 563 F.2d at 610–612. The excerpt from *Iroquois* relied on by Indicated Shippers is taken from a General Counsel’s “Memorandum to the Record” appended to the Commission’s decision. This Memorandum discusses the applicability of the Commission’s *ex parte* regulations that were then in place to the factual circumstances specific to that proceeding.

<sup>21</sup> 18 CFR 3c.3(b). This rule gives the Secretary of the Commission the exclusive responsibility for authorizing the initial public release of information concerning Commission proceedings.

<sup>9</sup> 18 CFR 385.2201(d)(1)(iii).

<sup>10</sup> Chevron Rehearing at 2.

<sup>11</sup> *Id.* at 3 (citations omitted).

<sup>12</sup> 18 CFR 385.2201(e)(1)(i).

<sup>13</sup> 18 CFR 385.2201(h).

<sup>14</sup> 18 CFR 385.214(b)(1).

<sup>15</sup> 18 CFR 385.2201(c)(5)(i).

<sup>16</sup> 64 FR at 51226. Any such requests not formally filed with the Commission of course would not be entertained by the Commission.

compliance matters not the subject of an ongoing proceeding.”<sup>22</sup>

Interior and Indicated Shippers object to the fact that the final rule does not cover communications concerning compliance with an order while a request for rehearing of the order is pending. Indicated Shippers allege that as it now stands, the parties who engage in such communications “will have determined on their own, without notice or opportunity for challenge, that the compliance issue raised in the communication is unrelated to the rehearing issues.”<sup>23</sup> In a similar vein, Interior complains that there may be “legitimate disputes” whether a compliance matter is the subject of an on-going proceeding, and that “[t]he integrity of the Commission’s processes” should not be left to the judgment of licensee and Commission staff.<sup>24</sup>

The Commission denies rehearing on this issue.<sup>25</sup> In our view, it is both necessary and appropriate to rely on the judgment of decisional staff to properly resolve such questions. Indeed, the premise of the *ex parte* rule is that staff members will exercise their professional judgment in these matters. We believe that Rule 2201(c)(5)(iii) adequately balances our goal of permitting fully informed Commission decisions while ensuring the integrity of the decisional process.

#### B. Exempt Off-the-Record Communications

##### (1) Off-the-Record Communications Expressly Permitted by Rule or Order

The final rule exempts from its purview (and does not require disclosure of) off-the-record communications “permitted by law and authorized by the Commission.”<sup>26</sup> In Order No. 607, the Commission interpreted this exemption as being limited to a situation in which there is “specific statutory authority permitting or directing interagency consultations to take place on an *ex parte* basis.”<sup>27</sup> The Commission concluded that the Endangered Species Act (ESA) does not specify that the interagency consultations it requires take place on an *ex parte* basis, and that such

consultations thus do not fall under the purview of this exemption.

Interior requests rehearing on this issue, claiming that the Commission neither cited authority nor provided an analysis for its limitation of Rule 2201(e)(1)(i)’s exemption to statutes specifically permitting *ex parte* communications. Interior asserts that as with interagency consultations under NEPA, off-the-record communications subject to disclosure would “support the goals” of the ESA, facilitate statutorily-required consultation between agencies, and accord sufficient weight to the “unique roles” of the consulting agencies and their relationship with the Commission.<sup>28</sup>

The Commission denies Interior’s request for rehearing. As discussed in the NOPR as well as Order No. 607,<sup>29</sup> limiting the exemption for off-the-record communications expressly permitted by rule or order to situations where there is specific statutory authority for such *ex parte* contacts is fully consistent with the APA. There is nothing in the ESA that suggests that required consultations should occur *ex parte*, and, as a matter of practice, the Commission has found that conducting interagency consultations in noticed meetings has not interfered with ESA compliance.

As Order No. 607 discussed, we view the process under NEPA as providing its own procedural assurances of notice, opportunity for comment, and record development, thus justifying a separate exemption to permit the Commission to develop an environmental record consistent with NEPA procedures. The ESA does not require the same opportunities for notice and comment. We will continue to have ESA consultation subject to notice. We have found this practice workable, and we are committed to making it as effective as possible. Finally, we note that the rule includes an exemption permitting off-the-record consultations in certain circumstances with non-party agencies under the ESA and other statutes.<sup>30</sup>

##### (2) Off-the-Record Communications Related to Emergencies

Order No. 607 established an exemption for off-the-record communications “made by a person outside of the agency related to an emergency,” subject to the disclosure requirement of 385.2201(g).<sup>31</sup> In

promulgating this exemption, we acknowledged the concern of some commenters that permitting off-the-record communications during economic emergencies could have an adverse effect on regulated markets in the context of a contested proceeding, and agreed that such emergencies could be dealt with by the Commission’s investigative powers. Nonetheless, we concluded that “especially with regard to emergencies affecting a regulated entity’s ability to deliver energy, it is imperative that, in the face of an emergency, it may initiate communications” with the Commission without fear of violating the prohibition on off-the-record communications.<sup>32</sup>

A. Indicated Shippers request rehearing of our decision to include off-the-record communications regarding economic emergencies (as opposed to such physical emergencies as natural disasters and equipment failures) within this exemption. Indicated Shippers assert that Order No. 607 fails to address “the problems inherent in defining when an economic situation is harmful to a participant in a contested proceeding, and when it is an ‘emergency.’”<sup>33</sup> They also argue that modern communications capabilities render it “difficult to envision an economic emergency” that would preclude a party in a contested proceeding from filing an emergency communication and serving it on the parties.<sup>34</sup>

The Commission finds the Indicated Shippers’ reasoning on this issue persuasive. We therefore hold that Rule 2201(e)(1)(ii) does not apply to emergencies that are solely economic in nature, but only to physical emergencies involving injury or threat of injury to persons, property or the environment. We further clarify that this exemption does not apply only to such disasters as earthquakes, floods and explosions, but to any physical emergency at a regulated facility or project or a facility that provides regulated services (such as electric generation and transmission facilities). Emergency actions may be necessary at a hydroelectric project, for example, to protect turbine blades from injury, to provide emergency flows to protect some species of fish in the case of a clogged minimum flow pipe, or to draw down a reservoir in case of extreme high flow events. Similarly, emergency actions might be necessary to protect the reliability of the electric transmission grid. Thus, we will amend the text of the final rule to limit this

<sup>22</sup> 18 CFR 385.2201(c)(5)(iii).

<sup>23</sup> Indicated Shippers Request for Rehearing at 7.

<sup>24</sup> Interior Request for Rehearing at 8.

<sup>25</sup> It is worth noting that the concerns raised by Interior are by and large limited to the hydroelectric project context. Compliance filings arising from gas and electric cases are routinely docketed, so that service on the parties is required.

<sup>26</sup> 18 CFR 385.2201(e)(1)(i).

<sup>27</sup> 64 FR at 51227.

<sup>28</sup> Interior Request for Rehearing at 5. We note that in spite of the way in which Interior frames its argument, communications under NEPA are not governed by exemption (e)(1)(i), but rather by exemption (e)(1)(vi).

<sup>29</sup> 64 FR at 51227 & n.48, citing 63 FR at 51312, 51316.

<sup>30</sup> 18 CFR 385.2201(e)(1)(v).

<sup>31</sup> 18 CFR 385.2201(e)(1)(ii).

<sup>32</sup> 64 FR at 51227.

<sup>33</sup> Indicated Shippers Request for Rehearing at 4.

<sup>34</sup> *Id.*

exemption to physical emergencies, and to clarify that it applies to any physical emergency at a regulated facility or a facility that provides a regulated service.

B. Upon reflection, the Commission believes that another aspect of Rule 2201(e)(1)(ii) requires revision. Under the emergency exemption as promulgated by Order No. 607, a member of Commission staff could be in violation of the final rule if, for example, he or she must telephone a hydroelectric licensee to resolve emergency flow conditions at a project while a licensing action is pending where such flow conditions are at issue. While emergency situations occurring during the license or certificate processes are not the norm, the Commission believes that it makes sense to ensure that the communications between the staff and the regulated parties are free and open in such situations, regardless of who happens to initiate the communication. Of course, any communication under this exemption, whether made from inside or outside of the agency, is subject to the disclosure requirement of Rule 2201(g)(1) and will be placed in the decisional record.

We therefore will amend 18 CFR 385.2201(e)(1)(ii) to delete the language "made by a person outside the agency."

### (3) Off-the-Record Communications with Other Federal, State, Local and Tribal Agencies

Under Rule 2201(e)(1)(v), certain off-the-record communications between the Commission and other governmental agencies are permitted, subject to disclosure:

An off-the-record communication to or from a Federal, state, local or Tribal agency that is not a party in the Commission proceeding, subject to disclosure under paragraph (g) of this section, if the communication involves:

(A) an oral or written request for information made by the Commission or Commission staff; or

(B) a matter over which the Federal, state, local, or Tribal agency and the Commission share jurisdiction, including authority to impose or recommend conditions in connection with a Commission license, certificate, or exemption.<sup>35</sup>

SCSI, EEI and Interior request rehearing on different aspects of this exemption. At the outset, however, the Commission believes a change in the language of subpart (A) is necessary to clarify our intent that, as to requests for information made by the Commission or Commission staff, the request itself is not covered by the rule because it is not relevant to the merits of a contested

proceeding. However, any response to such a request is covered by the rule, subject to this exemption and the disclosure requirement. We will therefore change the language of subpart (A) to refer to "an oral or written response to a request for information made by the Commission or Commission staff."

A. Both SCSI and EEI take issue with the idea that the Commission "shares jurisdiction" with resource agencies under the FPA.

We grant rehearing of the contention of SCSI and EEI that the Commission does not "share jurisdiction" with resource agencies under the licensing provisions of the FPA. Rather, it is more accurate to refer to non-party agencies that have regulatory responsibilities with respect to particular matters before the Commission, and we will amend the regulatory provision accordingly.

B. Additionally, SCSI and EEI generally object to Rule 2201(e)(1)(v), arguing that off-the-record communications with non-party agencies should be prohibited in licensing proceedings. More specifically, SCSI argues that this exemption, even with disclosure, exceeds the Commission's statutory authority and violates the *ex parte* provisions of the APA "by creating a blanket exemption allowing non-party, governmental agencies not otherwise authorized by law to make prohibited off-the-record communications."<sup>36</sup> According to SCSI, the APA does not provide "a generic exemption for interested officials" of governmental agencies, who must be considered "interested persons outside the agency" to whom the APA's *ex parte* provisions thus apply.<sup>37</sup>

The Commission denies the requests for rehearing of SCSI and EEI that this exemption cannot stand. We believe that the fact that this exemption is subject to the disclosure requirement protects the due process rights of parties to a proceeding. We disagree that this procedure, with its disclosure requirement, runs afoul of the APA. While such officials of non-party agencies may be "interested persons" for purposes of the APA, the disclosure process established by the rule sufficiently protects the rights of the parties to a contested proceeding from jeopardy, while recognizing the need for cooperation between governmental agencies and the development of

cohesive government policy. We believe this approach is consistent with the court's view in *PATCO*:

Congress sought to establish common-sense guidelines to govern *ex parte* contacts in administrative hearings, rather than rigidly defined and woodenly applied rules. The disclosure of *ex parte* communications serves two distinct interests. Disclosure is important in its own right to prevent the appearance of impropriety from secret communications in a proceeding that is required to be decided on the record. Disclosure is also important as an instrument of fair decisionmaking; only if a party knows the arguments presented to a decisionmaker can the party respond effectively and ensure that its position is fairly considered.<sup>38</sup>

In our view, the final rule's exemption for non-party agencies, subject to a disclosure requirement, is such a common-sense approach to balancing the competing interests at issue here. In this context, it also bears emphasis that our experience with the rule in the year since it has been promulgated indicates that the Commission staff has been prompt in submitting notices of exempt or prohibited communications to the Secretary's office, thus ensuring timely disclosure to affected parties.

C. SCSI believes that the disclosure requirement is insufficient in that agencies can later become parties to a proceeding, and suggests that Rule 2201(e)(1)(v) gives them "strategic advantages \* \* \* to wait to subject themselves to the strictures of Rule 2201 by intervening formally at the last possible minute."<sup>39</sup> EEI expresses similar concerns.

We do not believe such concerns are warranted. Under Rule 214(d) of the Commission's Rules of Practice and Procedure, the existing parties to a contested proceeding have an opportunity to oppose a motion for late intervention, and the decision whether to grant such a motion is a matter committed to the Commission's sound discretion, based on, *inter alia*, whether the movant can demonstrate good cause to be permitted to intervene late, and whether permitting late intervention might result in prejudice to the existing parties.<sup>40</sup> This procedural mechanism provides a sufficient safeguard against an agency attempting to unfairly manipulate the system.<sup>41</sup>

D. Finally, Interior challenges this provision of the *ex parte* rule from the opposite perspective, arguing that the Commission should expand the

<sup>38</sup> 685 F.2d at 563.

<sup>39</sup> SCSI Request for Rehearing at 8.

<sup>40</sup> 18 CFR 385.214(d)(i) and (d)(iv).

<sup>41</sup> Similarly, Commission policy prevents a cooperating agency under NEPA from subsequently intervening in a proceeding, to the prejudice of other parties. See n.50, *supra*.

<sup>35</sup> 18 CFR 385.2201(e)(v).

<sup>36</sup> SCSI Request for Rehearing at 12.

<sup>37</sup> *Id.* at 13. In this regard, SCSI relies on *PATCO v. FLRA II*, 685 F.2d 547, 562-63 (D.C. Cir. 1982) (*PATCO*) and *Portland Audubon Society v. Endangered Species Committee*, 984 F.2d 1534 (9th Cir. 1993).

exemption for off-the-record communications to include agencies that are parties to contested proceedings. Interior asserts that the Commission "provided no basis for its assertion that the public interest does not favor the free flow of information when an agency is also a party."<sup>42</sup>

The Commission denies rehearing. We believe that such an approach conflicts with fundamental fairness contemplated by the restrictions on *ex parte* communications established by the APA. Moreover, we find that such an approach adds little to the free flow of information that can occur on the record, while threatening to prejudice, or to appear to prejudice, the due process rights of other parties to a contested proceeding.

#### (4) Off-the-Record Communications Relating to NEPA Documentation

The final rule includes a specific exemption (subject to disclosure) for certain communications relating to NEPA documents:

(vi) An off-the-record communication, subject to disclosure under paragraph (g) of this section, that relates to:

(A) The preparation of an environmental impact statement if communications occur prior to the issuance of the final environmental impact statement; or

(B) The preparation of an environmental assessment where the Commission has determined to solicit public comment on the environmental assessment, if such communications occur prior to the issuance of the final environmental document.<sup>43</sup>

SCSI and INGAA seek rehearing of certain aspects of this exemption.

A. SCSI attacks the exemption's application to preparation of an EA in cases where the Commission solicits public comment on the ground that "[p]ublic participation does not justify or support exempting communications related to the preparation of an EA (whatever that might encompass)."<sup>44</sup> SCSI also objects to the exemption permitting off-the-record communications in assessing whether an applicant has complied with all relevant environmental statutes during the term of its license.

We deny SCSI's request for rehearing on this issue. In our view, the exemption strikes an appropriate balance: The rights of the parties to a licensing proceeding are adequately protected by the combination of public participation in the EA and EIS process and the disclosure requirement for the off-the-record communications, while at

the same time the exemption promotes communications which "may assist in the development of sound environmental analysis."<sup>45</sup>

B. SCSI further contends that allowing the off-the-record communications to be exchanged until the issuance of the final EA or EIS is unfair to the parties in a contested licensing proceeding because "more often than not" those documents are issued simultaneously with the Commission's final order.<sup>46</sup> In SCSI's view, this limits a party to seeking rehearing or reconsideration of substantive issues, procedures "wholly unsuited for submitting substantive evidence and argument that the applicant was in compliance with any or all relevant statutes."<sup>47</sup> INGAA likewise expresses concern that pursuant to this provision, "information that may affect either the EIS or the EA will not be disclosed to all parties in a timely manner."<sup>48</sup>

The Commission is cognizant of the concerns raised by SCSI and INGAA that parties must have adequate time to respond once off-the-record communications are disclosed. However, we see no need to grant rehearing with respect to Rule 2201(e)(1)(vi)'s exemption for NEPA-related documents on this basis. Rather, the Commission does not anticipate that such timing problems will arise in licensing proceedings, because we will not issue an order without first giving the applicant ample opportunity to respond to an off-the-record communication relied upon in the order. In most cases, this opportunity will be provided by the Commission's issuing a final NEPA document with its description and responses to comments prior to the issuance of a final order. Where the final NEPA document and the final order are issued simultaneously, the staff will ensure that disclosure of off-the-record communications is completed in advance. Finally, a request for rehearing is always available to a party as a due process safeguard in the event that a problem arises with respect to timely disclosure that the Commission has not foreseen in promulgating this rule.

C. Rule 2201(g), governing disclosure of exempt off-the-record communications, establishes an exception to the disclosure requirement where the "communication was with a cooperating agency as described in 40 CFR 1501.6, made under paragraph (e)(1)(v) of this section [relating to off-

the-record communications to or from non-party agencies]"<sup>49</sup>

EEL, INGAA and SCSI seek rehearing concerning this provision, contending that while the Commission stated in Order No. 607 that the exemption is limited to cooperating agencies under NEPA, the rule as promulgated contains no such limitation.

The provision at 40 CFR 1501.6 is a Council on Environmental Quality Regulation dealing expressly with NEPA and the role of cooperating agencies in the NEPA process. The Commission clarifies that the term cooperating agency as used in Rule 2201(g) is limited, by definition, to the context of NEPA.<sup>50</sup>

#### C. Handling and Notice of Off-the-Record Communications

The final rule established a requirement that the Secretary of the Commission issue a public notice, at least as often as once every 14 days, concerning the receipt of any off-the-record communications, whether prohibited or exempt.<sup>51</sup> For prohibited communications, the notice will disclose the particulars of the communication (identity of the maker, date of receipt by the Commission, docket number of the proceeding to which it relates), and state that the communication will not be considered by the Commission.<sup>52</sup> For exempt off-the-record communications which fall under Rule 2201(g), the Secretary is only required to list the communications or summaries of the communications.

EEL, Indicated Shippers and SCSI contest certain aspects of these provisions on rehearing.

A. EEL asserts that while the preamble to the rule in Order No. 607 indicated that notice of exempt off-the-record communications would include "prompt electronic notice through an

<sup>49</sup> 18 CFR 385.2201(g).

<sup>50</sup> Both EEL and SCSI question whether the exclusion in subpart (g) should properly refer to communications made under paragraph (e)(1)(vi), the NEPA exemption, rather than paragraph (e)(1)(v), the exemption for non-party agencies. The rule correctly refers to paragraph (e)(1)(v), as it is meant to apply only where the cooperating agency is not a party. Commission policy prevents an agency that has served as a cooperating agency from subsequently intervening in a proceeding. See *Rainsong Company*, 79 FERC ¶ 61,338 at p. 62,457 n. 18 (1997); Order No. 596, Regulations for the Licensing of Hydroelectric Projects, III FERC Stats. and Regs. Preambles, ¶ 31,057 at 30,644 (1997). Thus, the intervention opportunity provided for in the Commission's environmental regulations, accepting as timely those motions to intervene that are filed within the comment period for a draft EIS, could not be used to circumvent this policy. See 18 CFR 380.10(a).

<sup>51</sup> 18 CFR 385.2201(h).

<sup>52</sup> 18 CFR 385.2201(h)(1).

<sup>42</sup> Interior Request for Rehearing at 6.

<sup>43</sup> 18 CFR 385.2201(e)(1)(vi)(A) and (B).

<sup>44</sup> SCSI Request for Rehearing at 10.

<sup>45</sup> 64 FR at 51229.

<sup>46</sup> SCSI Request for Rehearing at 11.

<sup>47</sup> *Id.* at 12.

<sup>48</sup> INGAA Request for Rehearing at 3.

electronic service list," the text of Rules 2201(f) and (g) does not reflect that copies of off-the-record communications, or even notice of such communications, will be individually served on the parties to the proceeding.<sup>53</sup> EEI requests the Commission to clarify that under the rule such communications "will be promptly and directly served on the parties, or at least that the documents will be promptly posted on the Commission's website and the parties will be promptly notified on an individual basis."<sup>54</sup>

The Commission rejects EEI's request. The text of the final rule limits public notice to that made by the Secretary's office and does not require individual service to parties in a proceeding. Rather, notice of off-the-record communications will be placed on the public record in the **Federal Register**. To the extent the language in the preamble on which EEI relies appears to indicate a contrary view, we hereby disavow that language.

B. EEI asserts that mere posting by the Secretary every 14 days "may not be rapid enough" notice in "time sensitive proceedings."<sup>55</sup> SCSi makes a related argument, contending that the 14-day notice provision provides insufficient time to allow a hydroelectric license applicant to respond to exempt communications to or from a non-party agency under Rule 2201(e)(1)(v)(A).<sup>56</sup>

The Commission rejects the arguments of EEI and SCSi that the notice provisions of the rule are insufficient. The Commission continues to believe, as discussed in the preamble to the final rule, that the posting of prohibited or exempt communications at least every 14 days will provide sufficient notice. All prohibited and exempt communications covered by the rule will be available in the Commission's electronic records system in the affected docket as soon as they are processed by the Secretary's office. Parties to proceedings may routinely check the dockets in the proceedings if

they are concerned that a 14-day notice will not provide sufficient time.

In any event, the Commission observes that the rule establishes the minimum required notice, and that it will resolve individual situations on a case-by-case basis. Thus, if the Commission believes that the 14-day notice period is insufficient in a particular case, it retains the discretion to have the Secretary post the information on a more timely basis, or even to provide personal notice to the parties in the rare circumstances where, in its judgment, this is necessary to prevent prejudice to the participants in a proceeding governed by the *ex parte* communications rule.

C. Indicated Shippers assert that the notice disclosing an *ex parte* communication should identify the recipient of a communication, which it believes could be significant information for parties considering whether to seek to have the recipient recused. We reject as unnecessary Indicated Shippers' request that the rule be amended to require disclosure of the identity of the recipient of an off-the-record communication as unnecessary. As a general matter, written *ex parte* communications will ordinarily include the names of the sender and the addressee, as would a memorandum or written summary memorializing an oral off-the-record communication. More importantly, we do not agree that such information is of crucial significance to the parties. Under the rule, such off-the-record communications will be placed in the administrative record of a proceeding for all to see. In any event, in the case of a prohibited communication, the remedy protecting the interests of the affected parties is for the Commission not to rely on the communication in reaching its decision.

#### D. Other Issues

Upon reflection, the Commission believes that it would be helpful to clarify that the reference to "person" in the definition of the "General rule prohibiting off-the-record communications" employed the definition of "person" found in the general definitions applicable to the Commission's Rules of Practice and Procedure, which excludes the Commission and its employees.<sup>57</sup> As the rule now stands, it states that

Except as permitted in paragraph (e) of this section, in any contested on-the-record proceeding, no person shall make or knowingly cause to be made to any decisional employee, and no decisional employee shall make or knowingly cause to

be made to any person, any off-the-record communication.<sup>58</sup>

We are changing the references to "person" to "person outside the Commission," to make clear that the rule applies only to communications between those outside the agency and the Commission's decisional employees. Communications within the Commission are generally governed by the separation of functions rule.<sup>59</sup>

The Commission recognizes that both the *ex parte* rule as well as the separation of functions rule have an impact on the manner in which it will conduct its market monitoring and oversight responsibilities. As our market monitoring and oversight program evolves, with the transition of energy industries to competitive markets, the Commission may in the future determine that changes in either or both of these rules are necessary in order for it to adequately conduct these responsibilities.

We further observe that while the rule uses the term "off-the-record" interchangeably with "*ex parte*," there are situations where "off-the-record" communications are clearly not of an *ex parte* nature and not prohibited by the rule. For example, technical and settlement conferences under Subpart F of the Commission's regulations are off the record in that no transcript is kept, but all parties receive notice and can attend. Because discussions at these conferences are open to all participants, they are not barred by the rule. The rule does apply, however, to any private or "sidebar" conversations between participants and Commission staff that are relevant to the merits of pending contested matters, occurring during the course of the conference.

Additionally, we have made a few minor editorial changes in the regulatory text for the sake of clarity.

#### III. Document Availability

In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (<http://www.ferc.fed.us>) and on FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) as 888 First Street, N.E., Room 2A, Washington, DC 20426.

<sup>53</sup> EEI Request for Rehearing at 5-6, quoting 64 FR at 51233.

<sup>54</sup> *Id.* at 6.

<sup>55</sup> *Id.*

<sup>56</sup> SCSi also claims that the notice provision may negatively affect protocols entered into by the parties under the Alternative Licensing Process (ALP), if participants are unwilling to agree to time or disclosure requirements that vary from Rule 2201(g). However, the rule prohibiting off-the-record communications do not apply to the ALP, because the alternative procedures occur before a license application is filed, prior to any "proceeding" at the Commission. Moreover, SCSi may negotiate terms for communication it determines to be appropriate within the context of each ALP.

<sup>57</sup> 18 CFR 385.102(d).

<sup>58</sup> 18 CFR 385.2201(b).

<sup>59</sup> 18 CFR 385.2202. For example, the separation of functions rule addresses certain internal communications between decisional staff and staff involved in litigated proceedings or certain investigatory proceedings.



From FERC's Home Page in the Internet, this information is available in both the Commission Issuance Posting System (CIPS) and RIMS.

- CIPS provides access to texts of formal documents issued by the Commission since November 14, 1994.
- CIPS can be accessed using the CIPS link or the Energy Information Online icon. The full text of this document is available on CIPS in ASCII and WordPerfect 8 format for viewing, printing, and/or downloading.
- RIMS contains images of documents submitted to and issued by the Commission after November 16, 1981. Documents from November 1995 to the present can be viewed and printed from FERC's Home Page using the RIMS link or the Energy Information Online icon. Descriptions of documents back to November 16, 1981, are also available from RIMS-on-the-Web; requests for copies of these and other older documents should be submitted to the Public Reference Room.

User assistance is available for RIMS, CIPS, and the FERC Website during normal business hours from our Help line at (202) 208-2222 (E-mail to [WebMaster@ferc.fed.us](mailto:WebMaster@ferc.fed.us)) or the Public Reference at (202) 208-1371 (E-Mail to [public.referenceroom@ferc.fed.us](mailto:public.referenceroom@ferc.fed.us)).

During normal business hours, documents can also be viewed and/or printed in FERC's Public Reference Room, where RIMS, CIPS, and the FERC Website are available. User assistance is also available.

For the reasons discussed in the body of this order, we deny in part and grant in part Indicated Shippers' request for rehearing of Order No. 608.

#### IV. Effective Date

Changes to Order No. 607 made in this order on rehearing will become effective on January 2, 2001.

#### List of Subjects in 18 CFR Part 385

Administrative practice and procedure, Electric power, Penalties, Pipelines, and Reporting and record keeping requirements.

By the Commission.

**David P. Boergers,**  
Secretary.

In consideration of the foregoing, the Commission amends Part 385, Chapter I, Title 18, *Code of Federal Regulations*, as follows:

### PART 385—RULES OF PRACTICE AND PROCEDURE

1. The authority citation for Part 385 continues to read as follows:

**Authority:** 5 U.S.C. 551-557; 15 U.S.C. 717-717w, 3301-3432; 16 U.S.C. 791a-825r, 2601-2645; 31 U.S.C. 9701; 42 U.S.C. 7101-7352; 49 U.S.C. 60502; 49 App. U.S.C. 1-85.

2. Section 385.2201 is revised to read as follows:

#### § 385.2201 Rules governing off-the-record communications (Rule 2201).

(a) *Purpose and scope.* This section governs off-the-record communications with the Commission in a manner that permits fully informed decision making by the Commission while ensuring the integrity and fairness of the Commission's decisional process. This rule will apply to all contested on-the-record proceedings, except that the Commission may, by rule or order, modify any provision of this subpart, as it applies to all or part of a proceeding, to the extent permitted by law.

(b) *General rule prohibiting off-the-record communications.* Except as permitted in paragraph (e) of this section, in any contested on-the-record proceeding, no person outside the Commission shall make or knowingly cause to be made to any decisional employee, and no decisional employee shall make or knowingly cause to be made to any person outside the Commission, any off-the-record communication.

(c) *Definitions.* For purposes of this section:

(1) *Contested on-the-record proceeding* means

(i) Except as provided in paragraph (c)(1)(ii), any proceeding before the Commission to which there is a right to intervene and in which an intervenor disputes any material issue, any proceeding initiated pursuant to rule 206 by the filing of a complaint with the Commission, or any proceeding initiated by the Commission on its own motion or in response to a filing.

(ii) The term does not include notice-and-comment rulemakings under 5 U.S.C. 553, investigations under part 1b of this chapter, proceedings not having a party or parties, or any proceeding in which no party disputes any material issue.

(2) *Contractor* means a direct Commission contractor and its subcontractors, or a third-party contractor and its subcontractors, working subject to Commission supervision and control.

(3) *Decisional employee* means a Commissioner or member of his or her

personal staff, an administrative law judge, or any other employee of the Commission, or contractor, who is or may reasonably be expected to be involved in the decisional process of a proceeding, but does not include an employee designated as part of the Commission's trial staff in a proceeding, a settlement judge appointed under Rule 603, a neutral (other than an arbitrator) under Rule 604 in an alternative dispute resolution proceeding, or an employee designated as being non-decisional in a proceeding.

(4) *Off-the-record communication* means any communication relevant to the merits of a contested on-the-record proceeding that, if written, is not filed with the Secretary and not served on the parties to the proceeding in accordance with Rule 2010, or if oral, is made without reasonable prior notice to the parties to the proceeding and without the opportunity for such parties to be present when the communication is made.

(5) *Relevant to the merits* means capable of affecting the outcome of a proceeding, or of influencing a decision, or providing an opportunity to influence a decision, on any issue in the proceeding, but does not include:

(i) Procedural inquiries, such as a request for information relating solely to the status of a proceeding, unless the inquiry states or implies a preference for a particular party or position, or is otherwise intended, directly or indirectly, to address the merits or influence the outcome of a proceeding;

(ii) A general background or broad policy discussion involving an industry or a substantial segment of an industry, where the discussion occurs outside the context of any particular proceeding involving a party or parties and does not address the specific merits of the proceeding; or,

(iii) Communications relating to compliance matters not the subject of an ongoing proceeding.

(d) *Applicability of prohibitions.*

(1) The prohibitions in paragraph (b) of this section apply to:

(i) Proceedings initiated by the Commission from the time an order initiating the proceeding is issued;

(ii) Proceedings returned to the Commission on judicial remand from the date the court issues its mandate;

(iii) Complaints initiated pursuant to rule 206 from the date of the filing of the complaint with the Commission, or from the date the Commission initiates an investigation (other than an investigation under part 1b of this chapter) on its own motion; and

(iv) All other proceedings from the time of the filing of an intervention



disputing any material issue that is the subject of a proceeding.

(2) The prohibitions remain in force until:

(i) A final Commission decision or other final order disposing of the merits of the proceeding is issued; or, when applicable, after the time for seeking rehearing of a final Commission decision, or other final order disposing of the merits, expires;

(ii) The Commission otherwise terminates the proceeding; or

(iii) The proceeding is no longer contested.

*(e) Exempt off-the-record communications.*

(1) Except as provided by paragraph (e)(2), the general prohibitions in paragraph (b) of this section do not apply to:

(i) An off-the-record communication permitted by law and authorized by the Commission;

(ii) An off-the-record communication related to any emergency concerning a facility regulated by the Commission or a facility that provides Commission-regulated services, involving injury or threat of injury to persons, property, or the environment, subject to disclosure under paragraph (g) of this section;

(iii) An off-the-record communication provided for in a written agreement among all parties to a proceeding that has been approved by the Commission;

(iv) An off-the-record written communication from a non-party elected official, subject to disclosure under paragraph (g) of this section;

(v) An off-the-record communication to or from a Federal, state, local or Tribal agency that is not a party in the Commission proceeding, subject to disclosure under paragraph (g) of this section, if the communication involves:

(A) an oral or written response to a request for information made by the Commission or Commission staff; or

(B) a matter before the Commission in which a Federal, state, local, or Tribal agency has regulatory responsibilities, including authority to impose or recommend conditions in connection with a Commission license, certificate, or exemption;

(vi) An off-the-record communication, subject to disclosure under paragraph (g) of this section, that relates to:

(A) The preparation of an environmental impact statement if communications occur prior to the issuance of the final environmental impact statement; or

(B) The preparation of an environmental assessment where the Commission has determined to solicit public comment on the environmental assessment, if such communications

occur prior to the issuance of the final environmental document.

(vii) An off-the-record communication involving individual landowners who are not parties to the proceeding and whose property would be used or abuts property that would be used by the project that is the subject of the proceeding, subject to disclosure under paragraph (g) of this section.

(2) Except as may be provided by Commission order in a proceeding to which this subpart applies, the exceptions listed under paragraph (e)(1) will not apply to any off-the-record communications made to or by a presiding officer in any proceeding set for hearing under subpart E of this part.

*(f) Treatment of prohibited off-the-record communications.*

*(1) Commission consideration.*

Prohibited off-the-record communications will not be considered part of the record for decision in the applicable Commission proceeding, except to the extent that the Commission by order determines otherwise.

(2) *Disclosure requirement.* Any decisional employee who makes or receives a prohibited off-the-record communication will promptly submit to the Secretary that communication, if written, or a summary of the substance of that communication, if oral. The Secretary will place the communication or the summary in the public file associated with, but not part of, the decisional record of the proceeding.

(3) *Responses to prohibited off-the-record communications.* Any party may file a response to a prohibited off-the-record communication placed in the public file under paragraph (f)(2) of this section. A party may also file a written request to have the prohibited off-the-record communication and the response included in the decisional record of the proceeding. The communication and the response will be made a part of the decisional record if the request is granted by the Commission.

(4) *Service of prohibited off-the-record communications.* The Secretary will instruct any person making a prohibited written off-the-record communication to serve the document, pursuant to Rule 2010, on all parties listed on the Commission's official service list for the applicable proceeding.

*(g) Disclosure of exempt off-the-record communications.*

(1) Any document, or a summary of the substance of any oral communication, obtained through an exempt off-the-record communication under paragraphs (e)(1)(ii), (iv), (v), (vi) or (vii) of this section, promptly will be submitted to the Secretary and placed in

the decisional record of the relevant Commission proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under paragraph (e)(1)(v) of this section.

(2) Any person may respond to an exempted off-the-record communication.

*(h) Public notice requirement of prohibited and exempt off-the-record communications.*

(1) The Secretary will, not less than every 14 days, issue a public notice listing any prohibited off-the-record communications or summaries of the communication received by his or her office. For each prohibited off-the-record communication the Secretary places in the non-decisional public file under paragraph (f)(1) of this section, the notice will identify the maker of the off-the-record communication, the date the off-the-record communication was received, and the docket number to which it relates.

(2) The Secretary will not less than every 14 days, issue a public notice listing any exempt off-the-record communications or summaries of the communication received by the Secretary for inclusion in the decisional record and required to be disclosed under paragraph (g)(1) of this section.

(3) The public notice required under this paragraph (h) will be posted in accordance with § 388.106 of this chapter, as well as published in the **Federal Register**, and disseminated through any other means as the Commission deems appropriate.

*(i) Sanctions.*

(1) If a party or its agent or representative knowingly makes or causes to be made a prohibited off-the-record communication, the Commission may require the party, agent, or representative to show cause why the party's claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected because of the prohibited off-the-record communication.

(2) If a person knowingly makes or causes to be made a prohibited off-the-record communication, the Commission may disqualify and deny the person, temporarily or permanently, the privilege of practicing or appearing before it, in accordance with Rule 2102 (Suspension).

(3) Commission employees who are found to have knowingly violated this rule may be subject to the disciplinary actions prescribed by the agency's administrative directives.

*(j) Section not exclusive.*

(1) The Commission may, by rule or order, modify any provision of this section as it applies to all or part of a proceeding, to the extent permitted by law.

(2) The provisions of this section are not intended to limit the authority of a decisional employee to decline to engage in permitted off-the-record communications, or where not required by any law, statute or regulation, to make a public disclosure of any exempted off-the-record communication.

3. The title to Section 385.2202 is revised to read as follows:

**§ 385.2202 Separation of functions (Rule 2202).**

[FR Doc. 00-30241 Filed 11-29-00; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 301

[TD 8908]

RIN 1545-AV84

#### Disclosure of Return Information to the Bureau of the Census

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final regulations.

**SUMMARY:** This document contains final regulations relating to additions to, and deletions from, the list of items of information disclosed to the Bureau of the Census for use in certain statistical programs. These regulations reflect agreement between the IRS and the Bureau of the Census as to items of business tax information needed to more effectively meet the Bureau of the Census' program objectives with respect to existing economic programs.

**DATES:** *Effective Date:* These regulations are effective on November 30, 2000.

*Applicability Date:* For the date of applicability, see § 301.6103(j)(1)-1(e).

**FOR FURTHER INFORMATION CONTACT:** Stuart Murray, (202) 622-4570 (not a toll-free number).

#### SUPPLEMENTARY INFORMATION:

##### Background

On January 25, 1999, a temporary regulation (TD 8811) relating to disclosure of return information to the Bureau of the Census was published in the **Federal Register** (64 FR 3631). A notice of proposed rulemaking (REG-121806-97) cross-referencing the temporary regulations was published in

the **Federal Register** for the same day (64 FR 3669). No public hearing was requested or held. No written or electronic comments responding to the notice of proposed rulemaking were received. Accordingly, the proposed regulations are adopted as revised by this Treasury decision, and the corresponding temporary regulations are removed.

The regulations proposed by REG-121806-97 are adopted by this Treasury decision without revision and are discussed below.

#### Explanation of Provisions

Under section 6103(j)(1) of the Internal Revenue Code, upon written request from the Secretary of Commerce, the Secretary is to furnish to the Bureau of the Census (Bureau) tax return information that is prescribed by Treasury regulations for the purpose of but only to the extent necessary in structuring censuses and national economic accounts and conducting related statistical activities authorized by law. Section 301.6103(j)(1)-1 of the regulations provides an itemized description of the return information authorized to be disclosed for this purpose. Periodically, the disclosure regulations are amended to reflect the changing needs of the Bureau for data for its statutorily authorized statistical activities.

The amendments adopted by this Treasury decision authorize IRS personnel to disclose additional items of return information that have been requested by the Secretary of Commerce, and to delete certain items of return information that are enumerated in the regulations but that the Secretary of Commerce has indicated are no longer needed.

#### Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

#### Drafting Information

The principal author of these regulations is Jamie Bernstein of the Office of Associate Chief Counsel, Procedure & Administration (Disclosure & Privacy Law Division). However, other personnel from the IRS and Treasury Department participated in their development.

#### List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

#### Adoption of Amendments to the Regulations

Accordingly, 26 CFR Part 301 is amended as follows:

#### PART 301—PROCEDURE AND ADMINISTRATION

**Paragraph 1.** The authority citation for part 301 is amended in part by removing the entry for Section 301.6103(j)(1)-1T and adding an entry in numerical order to read as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*

Section 301.6103(j)(1)-1 also issued under 26 U.S.C. 6103(j)(1); \* \* \*

**Par. 2.** Section 301.6103(j)(1)-1 is amended by:

1. Revising paragraphs (b)(3) and (b)(6)(i)(A).
2. Adding paragraphs (b)(6)(iii) and (e).

The revisions and addition read as follows:

#### § 301.6103(j)(1)-1 Disclosures of return information to officers and employees of the Department of Commerce for certain statistical purposes and related activities.

\* \* \* \* \*

(b) \* \* \*

(3) Officers or employees of the Internal Revenue Service will disclose the following business related return information reflected on the return of a taxpayer to officers and employees of the Bureau of the Census for purposes of, but only to the extent necessary in, conducting and preparing, as authorized by chapter 5 of title 13, United States Code, demographic and economic statistics programs, censuses, and surveys. The "return of a taxpayer" includes, but is not limited to, Form 941; Form 990 series; Form 1040 series and Schedules C and SE; Form 1065 and all attending schedules and Form 8825; Form 1120 series and all attending schedules and Form 8825; Form 851; Form 1096; and other business returns, schedules and forms that the Internal Revenue Service may issue—